Filed 12/7/09 P. v. Montanez CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Appellant, v. STEVEN EZEQUIEL MONTANEZ, Defendant and Respondent.	B214748 (Los Angeles County Super. Ct. No. GA072330)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline H. Nguyen, Judge. Affirmed.

Steve Cooley, District Attorney, Phyllis Asayama and Gilbert S. Wright, Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Albert J. Menaster, Eric Stanford and Karen Nash, Deputy Public Defenders, for Defendant and Respondent.

The People of the State of California challenge the trial court's order setting aside the information against Steven Ezequiel Montanez alleging possession of methamphetamine and possession of an opium pipe or device. We affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

"'Upon review of a motion to set aside an information, this court disregards the superior court's ruling and directly examines that of the magistrate. [Citation.] We, like the superior court, must draw every legitimate inference in favor of the magistrate's ruling [holding defendants to answer] and cannot substitute our judgment on the credibility of witnesses or weight of the evidence. [Citations.]' (*People v. Eid* (1994) 31 Cal.App.4th 114, 125." (*People v. Looney* (2004) 125 Cal.App.4th 242, 244.) In accordance with this standard, we draw our facts from the evidence at the preliminary hearing.

At approximately 7:00 p.m. on December 25, 2007, Alhambra Police Officer Jasper Kim responded to a radio call to check the welfare of the occupant of a car in a parking lot outside a liquor store. According to the call, there was a subject falling asleep inside a black vehicle. Officer Kim entered the parking lot from Atlantic Boulevard and saw a black 2002 Nissan Altima parked four or five feet from the liquor store. Officer Orozco entered the parking lot from Alhambra Road a few moments later.

Officer Kim parked and approached the car on foot. He walked "just to the rear" of the driver's side front door and shined his flashlight into the vehicle. He saw defendant in the driver's seat. The seat was upright, such that "a driver probably would be able to drive, . . ." Officer Kim testified that he did not recall whether defendant was asleep when he saw him. He agreed that would have been an important fact to note, and admitted he had not mentioned in his report that the defendant was asleep.

Officer Kim testified that he asked defendant to "step out of the vehicle." "Due to the nature of the call with the check-the-welfare, I wanted to see as far as if the subject was either under the influence or in need of medical attention." Asked why he could not have made that assessment while the defendant was in the car, the officer explained that

he wanted to determine whether the defendant "was capable of being able to drive away, if I had driven away from the location." According to the officer, defendant got out of the car "consensually."

Office Kim noticed defendant had a box cutting tool in his hand when he opened the vehicle door. One of the officers told defendant to drop the box cutter, and he did. Once defendant was out of the vehicle, Officer Kim "asked him if he had any weapons, if I could search him." He made that request because defendant "was holding onto a potential weapon . . . ." The officer testified that defendant did not appear to be under the influence, nor did he exhibit any symptoms of illness when he got out of the vehicle. He also acknowledged that possession of a box cutter was not illegal. He continued the investigation "[d]ue to the fact of the nature that he did have the box cutting knife, I felt there was a need for officer safety issue before walking away from anything, to conduct a patdown search."

Officer Kim had defendant place his hands behind his back. He then patted defendant down and located "a small bulge inside of his left front pant pocket and I asked the subject what that was, and then he consented to me to going inside of his pocket. I reached inside and pulled out a glass pipe with brownish-black residue caked on it." Officer Kim recognized this item as a methamphetamine pipe.

Officer Kim conducted a more thorough search of defendant and located a second pipe in defendant's right front pant pocket. After that, Officer Kim looked through defendant's wallet. In a small zippered compartment he found two plastic bags with a white crystallized substance later determined to be methamphetamine. At that point, the officer arrested defendant.

Defendant's preliminary hearing testimony differed in several respects. He testified that he had been in his vehicle for approximately five minutes scratching off some California Lottery Scratchers when he saw a helicopter light shining into the parking lot. Then two police cars pulled into the parking lot. One entered from Alhambra Road and came to a stop behind defendant's car, blocking that driveway. The other police car came to a stop in the Atlantic Boulevard driveway, facing defendant's

vehicle. Defendant believed his vehicle was blocked at that point, that he "couldn't go anywhere."

Officer Kim told defendant to "'Just get out of the car, I need to talk to you.'" The officer told defendant he was investigating "'because somebody called the police and said that you were passed out in your car.'" Defendant told him he was not passed out, he was scratching some scratchers and had just come from inside the store. Officer Kim asked him if he had been drinking, or if he was diabetic. He replied no to both questions. As defendant got out of his car, he started walking back toward the liquor store. The officer stopped him and said, "'Hold on, where are you going?'" Defendant replied, "'I'm going back in the store.'" The officer told him, "'No, I need to talk to you.'" He continued: "'[F]or your safety and mine, I need you to step over here to the rear of the vehicle. I'm going to have to search you.'" Defendant replied, "'Search me?' I said, 'I guess, yeah.' I mean, I was in no predicament to tell him no, he was over standing in front of me and the other officer was behind me, I could see him he had his hand on his gun and he's standing there, you know, too. And I was like, okay, that's going on." According to defendant, he did not believe he could say no at that point. "[O]nce he asked me to get out of the car I felt like he took control of the situation, I was no longer in a position to say no."

As the officer escorted defendant to the area where the search would be performed, he asked defendant if he had any weapons. Defendant told him he had a box cutter in his pocket. The officer told him to reach into his pocket and slowly pull it out. He was then instructed to throw it on the ground and kick it away. He did so, and then was subjected to a patdown search which yielded the contraband giving rise to the charges in this case. Defendant testified that he had been using the box cutter at home to cut carpet which was under his aquarium.

Defendant was charged with violation of Health and Safety Code section 11377, subdivision (a), possession of methamphetamine, as a felony, and with violation of Health and Safety Code section 11364, subdivision (a), possession of an opium pipe or device, a misdemeanor.

Defendant moved to suppress the evidence pursuant to Penal Code section 1538.5. After hearing the testimony summarized above, the court denied the motion. The court explained: "My gut reaction, although I don't have any evidence to tell me, is that the store owner called the police saying there is someone parked here, I don't want them, they shouldn't be in the park lot, he's been here too long. Cops comes by and take a look, they look at the vehicle and they are doing a welfare check because that's the call that the officer got. Now, did the store owner say this is a person parked there too long? The store owner said, no. I don't know why this car is here, but I think that is my hunch as to why the officers were dispatched, but the officer doesn't know that's why he was dispatched. When he gets there, he is conducting a welfare check. You know, there are people who are in serious situations sometimes sitting in their car and I think the easier way is to go up, shine a flashlight, are you okay, step out of the car and conducting a welfare check. I think in the totality of the circumstances, even though Officer Kim had a lack of recollection in quite a number of factors and I think that is going to be very problematic at trial for the prosecution, it does not rise to the level where I'm going to suppress the evidence at this point." The court found sufficient cause to hold defendant to answer.

Defendant moved to set aside the information pursuant to Penal Code section 995 because the search leading to his arrest was unlawful. The trial court found there was no factual basis for a temporary detention of the defendant, and hence "everything that follows that initial improper detention has to also fail as well. So the motion is granted." The case was ordered dismissed, and the People filed a timely appeal.

DISCUSSION

"[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to

dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." (*Terry v. Ohio* (1968) 392 U.S. 1, 30.)

In this case, there was no evidence of criminal activity. The parking lot was private property, so the Alhambra Municipal Code section cited by the People, (ch. 11.34.10, subdivision (A), prohibiting habitation, including sleeping, in a motor vehicle in a public parking lot), was inapplicable. And in the absence of a call from the private property owner complaining that the car was parked illegally on the property, there was no indication of a Vehicle Code violation. There were no articulable facts to support a reasonable suspicion of criminal activity.

The officer's initial investigation instead must be considered under the community caretaking function often performed by police officers. (See *Cady v. Dombrowski* (1973) 413 U.S. 433, 441-442 [police officers "frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."].) A plurality of the California Supreme Court adopted the reasoning of *Dombrowski* in *People v. Ray* (1999) 21 Cal.4th 464. The court described this exception: "The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions? . . . '[I]n determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or "hunches," but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.' (*People v. Block* (1971) 6 Cal.3d 239, 244.)" (21 Cal.4th at pp. 476-477.)

In this case, Officer Kim was exercising his community caretaking function when he responded to a radio call describing a person "falling asleep inside a black vehicle" in

a parking lot. Once Officer Kim approached the vehicle, shined his light in it and ascertained that no one was sleeping there,[1] in the absence of specific facts suggesting further action was necessary, his investigation should have ended.

Officer Kim testified that he asked defendant to get out of the vehicle in order to make sure he was not under the influence or in need of medical attention. For purposes of this decision, we accept this as a reasonable basis for the officer's continuation of the investigation. But when defendant stepped out of the vehicle, the officer observed nothing to indicate that defendant was in need of assistance—there was no indication that he was under the influence, or that he was ill. There were no objective facts suggesting that further action was necessary. Any justification for detaining defendant ended at this time.

The People argue that continued detention was necessary for officer safety, since defendant was in possession of a box cutter when he stepped out of the vehicle. According to Officer Kim, defendant was holding the box cutter in his hand; according to defendant, it was in his pocket. There was no evidence that defendant brandished the box cutter or in any way threatened to use it as a weapon.[2] It is undisputed that as soon as he was told to put the box cutter down, he did so. There was nothing illegal about defendant's possession of this item under the circumstances.[3]

"'[R]easonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,'"

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[1] Officer Kim did not recall whether or not the person inside the vehicle was asleep. We may infer that defendant was not asleep from the absence of any mention of that fact in the police report and from the officer's admission that it would have been an important fact to note in his report.

[2] The prosecutor argued that defendant "brandished" the box cutter at the officer. There was no evidence to support that assertion.

[3] There are circumstances where possession of a box cutter may be illegal. For example, Penal Code section 626.10 prohibits a student from bringing or possessing a box cutter with an exposed blade on school grounds. (*In re Z.R.* (2008) 168 Cal.App.4th 1510, 1514.) No such prohibition applies to a vehicle parked in a private parking lot.

[citation].' (*Maryland v. Wilson* (1997) 519 U.S. 408, 412.) In engaging in this weighing process, courts must act as vigilant gatekeepers to ensure that the community caretaking exception does not consume the warrant requirement." (*People v. Madrid* (2008) 168 Cal.App.4th 1050, 1058.) Given that the community caretaking concerns had been satisfied and that defendant voluntarily dropped the box cutter upon request, there was no reasonable justification for extending the detention. Officer safety would be a concern only if defendant were to remain with the officers. Where, as here, there was no evidence of criminal activity or need of assistance, and the sole item that could be used as a weapon was no longer in defendant's possession, the defendant should have been free to leave. That eliminated any ongoing concern for the safety of the officers during the detention which would justify a patdown search for weapons. The patdown search violated the Fourth Amendment, and the fruits of that search were tainted by that illegality. The trial court properly granted defendant's motion to dismiss the case.

DISPOSITION

The order is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.